

Jain Commission of Enquiry

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Court : Delhi

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Judge : M.C. Jain, J.

Acts : [Commissions of Enquiry Act, 1952](#) - Sections 2, 3, 4, 5, 6, 8B and 8C; Terrorist and Disruptive Activities (Prevention) Act, 1987 - Sections 16; Code of Criminal Procedure (CrPC)

Appellant : Jain Commission of Enquiry

Advocate for Pet/Ap. : B. Datta, Sr. Adv. and; Anil Nag, Adv; K.L. Arora, Sr.

Judgement :

ORDER

On June 1. 1993, the Commission passed a short Order stating that a detailed reasoned Order will follow. The Commission records the following detailed reasoned Order :

Backdrop

1.1 Shri Rajiv Gandhi, former Prime Minister of India, was assassinated on 21st May, 1991 around 10-20 p.m. at the Congress (I) election meeting venue at Sriperambudur. The police investigation of the bomb blast commenced with the registration of the case as Crime No. 329/91 under Sections 302, 307 and 326

with the I.P.C. and Sections 3 and 5 of the Explosives Substances Act, at Sriperambudur Police Station, Anna West District, Tamil Nadu at 0115 hours on 22.5.1991. Immediately on registration, the investigation was taken over by the Crime Branch, C.I.D., Madras the same day vide Government of Tamil Nadu Notification No. SE-2860/91 dated 22nd May, 1991. The consent under Section 6 of the Delhi Special Police Establishment Act was accorded to the Central Bureau of Investigation to take up the investigation. In pursuance of the said Notification, Government of India, vide Notification No. 228/28/9-AVD/II dated 23.5.1991 extended the jurisdiction of the Special Police Establishment under Section 5 of the Delhi Special Police Establishment Act. On 24.5.1991, the case was received on transfer and registered as Crime No. RC/9/S/91-SCB-Madras with the Special Crime Branch of the CBI, Madras. For handling the investigation of the case, a Special Investigation Team (SIT) headed by Shri D.R. Karthikeyan, Joint Director in the CBI was set up as part of the CBI. During the course of the investigation, Sections 120(B) of I.P.C. and Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the TADA Act) were added.

1.2 The assassination stunned and shocked the nation as a whole. The grief stricken people of this country became impatient to know as to how it all happened and this impression gained ground that there was lack of adequate security. The Central Government thereupon appointed a one-man Commission of Inquiry headed by Justice J.S. Verma, a sitting Judge of the Supreme Court of India vide Notification No. S.O./356(E) dated 27.5.1991 to make an inquiry with respect to the following matters :

(a) whether the assassination of Shri Rajiv Gandhi could have been averted and whether there were lapses or dereliction of duty in this regard on the part of any of the individuals responsible for his security;

(b) the deficiencies, if any, in the security system and arrangements as prescribed or operated in practice which might have contributed to the assassination.

1.3 The Commission was also to recommend the corrective remedies and measures that need to be taken for the future with respect to the matters specified

in Clause (b) above.

1.4 The people were not satisfied with the terms of reference of the said Commission as they were anxious to know the whole conspiracy behind the assassination of Shri Rajiv Gandhi. They were interested to know not only the killers but also the conspirators, not only the hands but also the brains behind the assassination, and the sequence of events which led to the assassination and all the facts and circumstances relating to the assassination. The issue was debated in the Parliament for enlargement of the terms of reference of the one-man Commission headed by Justice J.S. Verma. Shri P.V. Narsimha Rao, President of the AICC (presently the Prime Minister of India) wrote to Shri Chandra Shekhar, the then Prime Minister of India on June 2, 1991 in reply to his letter dated 31.5.1991 on the Verma Commission's terms of reference. He forwarded a revised draft of the terms of reference which would meet the ends of justice and satisfy the people. The revised draft sought to add the following term of reference :

'Whether any person or persons or agencies were responsible for conceiving, preparing and planning the assassination and whether there was any conspiracy in this behalf, and if so, all its ramifications'.

1.5 Shri R.K. Bhargava, Home Secretary, wrote a letter dated June, 4, 1991 to Hon'ble Mr. Justice J.S. Verma stating therein that the AICC has approached the Government for revising the terms of reference and enclosed three documents, namely :

(1) Notifications dated 20th November, 1984 issued by the Ministry of Home Affairs setting out the terms of reference of the Thakkar Commission.

(2) Notification dated 27th May, 1951 issued by the Ministry of Home Affairs setting out the terms of reference of the Verma Commission; and

(3) Letter dated June 2, 1991 from the President, AH India Congress Committee regarding amendment of the terms of reference of the Verma Commission.

1.6 Justice J.S. Verma wrote back to Shri Bhargava on June 8, 1991 in which he expressed that the existing terms of reference alone fall within the purview of the

legitimate functions of the sitting Judge of the Supreme Court of India. He stated the addition to the terms of reference would be outside the domain of the judicial functions. The Government would also be aware that the Supreme Court subscribed to this view when it made an exception and agreed to spare the services of a sitting Judge to head the Commission. He further stated that the matters covered by the suggested additional term of reference do not fall within the scope of the legitimate functions of a sitting judge and by its very nature, are within the scope of the functions of the investigating agencies which are engaged in the task of an investigation of the crime. He declined to give his consent for enlargement of the scope of inquiry of his Commission in the manner suggested in the letter.

1.7 It is in this backdrop that the present Commission was appointed on 23rd August, 1991 vide Notification No. SO/545(E) for the purpose of making an inquiry into a definite matter of public importance, namely, the assassination of Shri Rajiv Gandhi, former Prime Minister of India, on 21st May, 1991.

1.8 The Notification said that the Commission shall make an inquiry with respect to the following matters :

(a) the sequence of events leading to, and all the facts and circumstances relating to, the assassination of Shri Rajiv Gandhi at Sriperambudur (other than the matters covered by the terms of reference for the Commission of Inquiry headed by Shri Justice J.S. Verma);

(b) whether any person or persons or agencies were responsible for conceiving, preparing and planning the assassination and whether there was any conspiracy in this behalf and, if so, all its ramifications.

1.9 The Special Investigation Team (SIT), after completion of the investigation, had submitted a charge-sheet on 20.5.1992 before the Designated Court at Madras against 41 accused persons out of whom three were shown as absconding and 12 as dead. Thereafter, before the Designated Court, the case has been opened by the prosecution and after hearing arguments before charge, charges will be framed and trial will commence.

1.10 The Commission, in order to consider the scope and parameters of the terms of reference, held its public hearing on 27th August, 1992 and in that hearing Mr. G. Ramaswamy, the then Attorney General of India had vehemently urged that this Commission had absolutely no jurisdiction to conduct any inquiry into the areas covered by the charge-sheet submitted by the SIT before the Designated Court. The SIT investigated the crime under the provisions of the Code of Criminal Procedure. It is a statutory authority empowered by law to conduct a statutory investigation. The Central Government has full faith in the thoroughness and impartiality of the investigation of the SIT. When a police officer investigates into a cognizable offence under the provisions of Chapter XII of the Code of Criminal Procedure, he performs a statutory duty and the report submitted by him under Section 173 of the Cr.P.C. is a statutory report and has force proprio vigore and it entails civil consequences.

Submissions of Counsel for the Parties :

2.1 Mr. B. Datta, the learned Counsel for the Central Government adopted the submissions of the then Attorney General Mr. G. Ramaswamy and urged that no Court, not even the Supreme Court, can interfere with the investigation by even the lowest police functionary, nor can any Court or authority impinge upon the jurisdiction of the investigating officer or compel him to change his opinion. He placed reliance in support of his submissions on the following decisions :

- (1) Emperor v. Khwaja Nazir Ahamed, .
- (2) State of West Bengal v. S.N. Basak, : [1963]2SCR52 .
- (3) HN Rishbud v. State of Delhi, : 1955 CriLJ526 .
- (4) Abhinandan Jha v. Dinesh Mishra, : 1968 CriLJ97 .
- (5) Jayant Vitamina v. Chaitanya Kumar, JT 1992(4) 487.

2.2 He, therefore, contended that the Commission will have no authority to review the investigation done or the conclusions reached by the SIT. He, however, stated in the written submissions in paras 14, 20, 21 and 22 that the only course open to

the Commission would be to advert to the relevant material and to articulate the reasons for forming the opinion that there are grounds for entertaining suspicions about the involvement of some persons other than the culprits named in the charge-sheet and to recommend that the matter is required to be further investigated by the investigating agency. The Commission will proceed to collect information and gather material to ascertain the involvement of persons or agencies other than the accused charge-sheeted by the SIT, after ascertaining whether the facts mentioned in the affidavits have been already investigated by the SIT. He also referred to the affidavit of Home Secretary Dr. Madhav Godbole and said that his affidavit gives the stand of the Government for which it may be stated that the Commission, on 25.9.1992, had passed an order to the effect that Shri Madan Loqur, Advocate for the Central Government, prayed for four weeks' time for filing the written submissions and case law and also for filing the application stating the stand of the Government in respect of areas covered by the investigation conducted by the SIT culminating into a charge-sheet, in compliance of this order, the Home Secretary Or. Madhav Godbole filed an affidavit in which it was stated that the statutory investigation into the assassination had already been initiated by the SIT when the terms of reference of this Commission were finalised. The Commission was not intended to review the investigation or scrutinize the investigation of the SIT. The Government has full faith in the investigation carried out by the SIT and now on the basis of the investigation, the charge-sheet has been filed before the Designated Court. The Central Government did not intend or wish to jeopardize the trial of the accused. It was also stated that the terms of reference of this Commission ought to be interpreted in such a manner as to ensure that the trial is neither prejudiced nor any person accused in the case, nor any witness cited by the SIT is called upon to give any evidence before this Commission. Virtually these are the submissions made by Shri Datta. On receipt of this affidavit, a letter was addressed to Dr. Madhav Godbole stating that the affidavit merely represents an argument and the affidavit cannot be taken as a substitute for the application which the Attorney General had volunteered to file while stating the stand of the Government. The application, which was to be submitted by the Attorney General, was to take a clear stand as to whether the Government wants or does not want this Commission to inquire into the areas

covered by the investigation conducted by the SIT culminating into the charge-sheet. Mr. B. Datta now in his submissions has categorically stated that he does not want to submit any such application before the Commission. How the terms of reference are to be interpreted and what is the scope and parameters of the terms of reference are matters which need to be decided by the Commission after hearing the parties. Mr. B. Datta then urged that as the Designated Court is seized of the matter, it would not be proper for this Commission to hold a parallel inquiry and he referred to the report of Mr. Justice M.P. Thakkar Commission which inquired into the assassination of Smt. Indira Gandhi, the terms of reference of which Commission were identical to the terms of reference of this Commission. He also referred to the report of Mr. Justice K.K. Mathew Commission relating to the murder of Shri L.N. Mishra, the then Minister for Railways. He extensively relied upon the observations made by these Commissions in their reports which I shall consider at an appropriate place.

2.3 Shri K. Subramanian, learned Advocate General for the State of Tamil Nadu on the other hand submitted that there is no specific exclusion of the investigation done by the SIT in the notification of this Commission. In the terms of reference of Justice S.R. Tendulkar Commission on R.K. Dalmia Companies, there was a specific exclusion of the matters pending before the criminal Court. Also, there was no specific exclusion of the matters under investigation by the C.B.I. in the terms of reference of Justice J.S. Verma Commission. The SIT not only participated in the proceedings before the Justice Verma Commission but also produced four video Cassettes which they had seized and the evidentiary value of those Cassettes was also discussed by the said Commission in Chapter 11 of the report relating to appreciation of evidence. The last hearing before the Justice Verma Commission was on 4 5 1992 and by that time the charge-sheet was not filed. The case was under investigation. The photographs were also produced before the Commission. Regarding the question of tempering of the cassettes, it was stated before the Commission by the SIT Chief Shri D.R. Karthikeyan that the cassettes are being examined by foreign scientific experts to find out as to whether the cassettes have been tempered with or not. The learned Advocate Central submitted that with the present terms of reference of this Commission, it is not open to successfully contend that this Commission lacks jurisdiction over the

areas covered by the charge-sheet. However, the Commission may refrain itself to go into those areas in respect of which trial is going on in the Designated Court and the on-going trial may not in any way be prejudiced.

2.4 Mr. R.N. Mittal, learned Counsel for the AICC(I) vehemently and strenuously submitted that the terms of reference of this Commission are very wide which only exclude matters covered by the terms of reference of Justice J.S. Verma Commission. This Commission's powers are vast and unlimited in the sense that it has to unearth the conspiracy behind the assassination. It has to find out the person, persons or agencies responsible for conceiving, preparing and planning the assassination. It has to deal with all the ramifications of the conspiracy, if so found, and besides that, the sequence of events leading to assassination as well as all the facts and circumstances relating to the assassination have to be found out by this Commission. He also submitted that this Commission should have self-imposed restraint and refrain from prejudicing the trial. The cause is common for investigation by the SIT and for probe by this Commission and one should not prejudice the other. He emphasised that this Commission is competent to examine all investigation record, documents, materials and evidence collected by the SIT: He pointed out that this Commission may even consider the evidence which may be inadmissible in law and the principles embodied in the Code of Criminal Procedure and the law of evidence will not be applicable to the proceedings before the Commission. Even the standard of proof may differ. I need not be proof beyond reasonable doubt. He also urged that there may be areas which may not have been investigated by the SIT or there may be persons who may be suspects but for want of legal evidence, they may not have been sent up for trial. So, the scope of inquiry by this Commission is very wide.

2.5 Mr. R. Muthukrishnan, Advocate for the TNCC(I) submitted that this Commission may inquire into the areas which are not covered by the SIT and should not probe the areas covered by the charge-sheet till the trial is over.

2.6 Mr. T.G. Venkataraman, learned Counsel for the DMK also adopted the same argument that trial should not be disturbed although the Commission has got wide powers to find out the truth.

2.7 Mr. K.V. Viswanathan, learned Counsel for AIADMK submitted that what powers or jurisdiction the Commission possesses, is only referable to the terms of reference of this Commission. It is only beyond the terms of reference, this Commission cannot go. The contours of inquiry by this Commission are laid and defined in the notification of appointment of this Commission. The Central Government should stand by the terms of reference embodied in the notification. The scope has to be understood in the light of the terms of reference themselves. The terms of reference cannot be changed or altered or interpreted differently by any affidavit or written submissions. This Commission has to inquire what is mentioned in the terms of reference which are quite explicit and are not in any way vague and require no interpretation,

2.8 Shri K.L. Arora, learned Counsel for the Commission refuted the submissions made by Shri B. Datta, Sr. Advocate for the Central Government, and urged that as far as law is concerned, there is absolutely no bar whatsoever. This Commission has vast powers to call for any record or documents and probe into matters referred to this Commission. This Commission can probe all aspects, all areas whether covered by the charge-sheet or which are beyond the charge-sheet. The matter of inquiry is a definite matter of great public importance as it is in respect of the assassination of the Former Prime Minister of this country. The Commission has to satisfy that the investigation done by the SIT has been fair, thorough and correct and for arriving at the satisfaction, the SIT must produce case diaries documents, all records and materials collected by it and also to find out what areas have not been investigated, what leads have been left half investigated, what leads have been investigated and wrongly investigated what persons have not been prosecuted against whom there may or may not be legally admissible evidence. He submitted that the proceedings of the Commission may be conducted keeping equally in view the provisions of the Terrorist and Disruptive Activities (Prevention) Act. Proceedings may be in camera under the Regulations of Procedure framed by this Commission He pointed out that there may be difficulties if the trial by the Designated Court and inquiry by this Commission proceed simultaneously and it may give rise to practical problems but as a matter of law, for that reason the Commission cannot be said to be devoid of the jurisdiction over the areas covered by the charge-sheet. Both should proceed

smoothly.

2.9 Shri K. Veeramani, General Secretary, Dravida Kazhagham had sent his written submissions in which he stated that the SIT investigation was one-sided and the investigation conducted by the SIT will not be a conclusive proof. The whole matter has to be inquired into by this Commission and the inquiry by this Commission is not a parallel inquiry and this Commission can enter into areas investigated by the SIT. The Commission should examine all the omissions and commissions of the SIT as well.

Consideration of Submissions and Powers and Jurisdictions of the Commission

3.1 I have given my serious and anxious consideration to the contentions advanced before me by the learned Counsel for the parties.

3.2 The most important question which needs deeper and thoughtful consideration is whether there is complete or total want of jurisdiction in the Commission to hold an inquiry into the areas or matters covered by the charge-sheet, conducted or having nexus to the terms of reference of this Commission. The cases cited by Shri B. Dutta on non-interference in investigation by any authority, howsoever high it may be, have no relevance and application to the question in issue before me.

3.3 For that, we have to look to the relevant provision of the Commissions of Inquiry Act, 1952 and to see as to what is the purpose and policy behind the Act. Through this legislation what is intended to be achieved is, that truth may be made known about the definite matter of public importance after inquiry by the Commission. The Commissions of Inquiry Act is an Act to provide for the appointment of Commissions of inquiry and for vesting such Commissions with certain powers. The Commissions of Inquiry are appointed under Section 3. The appropriate government is conferred with the power to appoint a Commission of Inquiry for the purpose of making an inquiry into a definite matter of public importance and perform such functions and within such time as may be specified in the notification. Sub-section 1 of Section 3 reads as under :

'The appropriate Government may, if it is of the opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by each House of Parliament or, as the case may be, the Legislature of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly.'

3.4 It would appear from the above provision that whenever the appropriate Government is of the opinion that it is necessary so to do, it shall by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into a definite matter of public importance. It is imperative for the Commission so appointed to make an inquiry and perform the functions accordingly. The Commission so appointed is required to make inquiry into a definite matter of public importance.

3.5 In order to make inquiry, further powers have been conferred on the Commission. Section 4 deals with powers of Commissions, which is as follows:

'The Commission shall have the powers of a Civil Court, while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely :

(a) Summoning and enforcing the attendance of any person from any part of India and examining him on oath :

(b) requiring the discovery and production of any document ;

(c) receiving evidence on affidavits ;

(d) requisitioning any public record or copy thereof from any Court or office ;

(e) issuing Commissions for the examination of witnesses or documents ;

(f) any other matter which may be prescribed.

3.6 Under the said provision, the Commission has been conferred with the powers of a Civil Court in the aforesaid matters. It can enforce attendance of witnesses. It has the power of discovery and production of a document. It can requisition any public record or copy thereof from any Court or office. It can receive evidence on affidavit and is also empowered to issue Commission for the examination of witnesses or documents.

3.7 Additional powers have been conferred by Section 5 and under Sub-section 2, the Commission has the power to require any person to furnish information on such points or matters as, in the opinion of the Commission, may be useful for or relevant to the subject matter of the inquiry and any person so required shall be deemed to be legally required to furnish such information within the meaning of Sections 176 and 177 of the Indian Penal Code. Section 5A is also relevant for conducting of investigation pertaining to inquiry. This provision confers powers on Commission to utilize the services of certain officers and investigating agencies. It would appear that the services of officers or investigating agencies can be utilized by resorting to the powers conferred on the Commission under Section 5A,

3.8 Section 6 of the Act is further relevant. It makes a provision regarding statements made by persons to the Commission. This Section provides that no statement made by a person in the course of giving evidence before the Commission shall subject him to or be used against him in any civil or criminal proceeding, except a prosecution for giving false evidence by such statement provided that the statement (a) is made in reply to a question which he is required by the Commission to answer or (b) is relevant to the subject matter of the inquiry.

3.9 Thus, it would appear that the Commissions appointed under the Commissions of Inquiry Act draw their authority to make an inquiry under the notification by which they are appointed and they are possessed of full powers under the provisions aforesaid to perform the statutory duty of making an inquiry and submitting their reports to the government. The history of legislation suggests that prior to the enactment of the Commissions of Inquiry Act, the inquiry authority was appointed by the government under its executive powers or by special legislation. There was no Central law to regulate the powers of such bodies and those

Commissions and Committees felt handicapped in the absence of any statutory power to enforce the attendance of witnesses and production of documents. It was felt that, there should be a general law authorising an inquiring authority on any matter of public importance, whenever considered necessary, and that such law should enable the inquiring authority to exercise certain specific powers including the powers to summon witnesses to take evidence on oath and and to compel persons to furnish information. The Commission appointed under Section 3 is required to make an inquiry into the matters which have been referred to the Commission for inquiry. It is the notification which confers jurisdiction to hold inquiry into those matters. It is to be seen as to whether this jurisdiction is taken away if any such matter is pending consideration before any other jurisdiction, forum or authority. It is true that under the Code of Criminal Procedure, the machinery of criminal law is set in motion by lodging of the FIR under Section 154 of the Cr. P.C. and the investigating officer or authority is required to investigate on that report and to submit its final report or charge-sheet or challan under Section 173 of the Cr. P.C. The learned Attorney General as well as Shri B. Dutta had referred to the provisions contained in Chapter XII of the Code of Criminal Procedure and submitted that the Magistrate is required to take cognizance on the policereport under Section 190(b). There are provisions of inquiry by the Magistrate under the Code of Criminal Procedure and there are other provisions relating to trials by the Magistrate and the Court of Session. No one can interfere directly or indirectly in the exercise of statutory authority for conducting the investigation and it may be mentioned that the report under Section 173 has force proprio vigore as further proceedings would be conducted in pursuance of that report resulting into either discharge, acquittal or conviction. 'In my opinion, the jurisdiction under the Code of Criminal Procedure possessed by the Courts and the jurisdiction of the Commission under the Commissions of Inquiry Act are two independent jurisdictions and the exercise of the same would be within their respective domain or sphere and the two jurisdictions may continue to function in a parallel manner simultaneously. The Commissions of Inquiry Act is a self-contained law. Filing of the charge-sheet cannot be taken to mean that the Commission is divested of its jurisdiction to conduct the inquiry in matters covered by the charge-sheet which also fall within the ambit of the terms of reference.'

State of Investigation on the Date of Appointment of the Commission

4.1 It may be relevant to note that the FIR in the case was already filed on the very night of the occurrence i.e. night intervening 21st and 22nd May, 1991 and thereafter some definite progress in investigation had already been made by 23rd August, 1991 when this Commission was appointed. Among the items seized from the scene of crime was a Chinon camera found lying on the body of the person later identified as Haribabu, the dead photographer. The first frame of the film developed from that camera showed a spectacled dark woman wearing orange salwar and green kameez with red 'Kanakambaram' flowers in her hair holding a sandalwood garland flanked by two persons identified as Lata Kannan and her daughter Kokila Vani together with a kurta pyjama clad man standing a little distance away. From the forensic finding, it, was revealed that the explosion was caused by an improvised explosive device made up of explosive material called RDX embedded with metallic pellets concealed in a blue vest-cum-waist jacket with velcro fasteners by a person who detonated the explosive device while in close proximity of Shri Rajiv Gandhi. The female dead body was identified as that of the person who while wearing the blue vest-cum-waist jacket fitted with the improvised explosive device caused the detonation. This was done on the basis of forensic examination of the flesh and tissues and clothes sticking to the improvised explosive device and the dismembered parts of the assassin. Regarding the identification of the fourth person, first clue came from a journalist of a national news magazine who was present, to cover that meeting. On 3-6-1991, a bunch of documents belonging to Haribabu, received by the Director General (Police) in a sealed unregistered envelope from an unknown sender, was delivered to SIT.

4.2 By 23-8-1991, the following accused persons were already arrested during the investigation :

1. Nalini
2. Suthendraraja alias Santhan
3. V. Sriharan alias Murugan alias Thass alias Indu Master

4. S. Kanakasebapathy alias Radhaayya
5. A. Chandraleka alias Athirai alias Sonia alias Gowri
6. Robert Payas
7. S. Jayakumar alias Jayakumaran alias Jayam
8. S. Vijayan alias Perumalvijayan
9. S. Bhaskaran alias Velayudham
10. G. Perarivalan alias Arivu
11. S. Bagyanathan
12. S. Padma
13. A. Sundaram alias Subah Sundaram

4.3 The following accused persons had died by 23-8-1991 :

1. Sivarasan alias Raghuvaran alias Packiachandran
2. Dhanu alias Anbu alias Kalaivani
3. Subas alias Nitya alias Malliga
4. S. Haribabu
5. Nehru alias Nero alias Gokul
6. N. Shanmugam alias Jayaraj
7. Suresh Master
8. Dixon
9. Amman alias Gangaikumar

10. Driver Anna alias Keerti

11. Jamuna alias Jameela.

4.4 Three accused persons, namely LTTE supreme V. Prabhakaran, Pottu Amman and Akila could not be arrested as they were in Sri Lanka, although their involvement was known to the SIT. Now they are shown as 'absconding' in the charge-sheet. Others who have been charge-sheeted, were arrested after 23-8-1991. The envelope received by the SIT contained letters and sketch of Vellore jail etc. which confirmed the involvement of the Photographer Haribabu and also of Bagyanathan. Bagyanathan was found to be running a printing press. He was closely associated with Baby Subramanian and Muthuraja. Both of them had left for Jaffna before the assassination. The Tanjore district police arrested Shanker alias Koneswaran and seized from him a paper containing Madras telephone numbers and on verification it was found to be that of Anabond Silicon Pvt. Ltd. From Haribabu's second photograph, two women were identified by an eye witness who stated that she had seen these women talking to the assassin and the kurta pyjama clad man just before the blast. Investigation led to the identification of one of the women as Nalini, sister of Bagyanathan and working in the aforesaid private company. Thus, Nalini's link with the group was established. On 11-6-1991, Bagyanathan and his mother Padraa were arrested. Nalini and her husband Murugan were arrested on 14-6-1991. The identity of kurta pyjama clad man was taken as Sivarasan and the assassin woman was identified as Dhanu. Another lady who was identified as Subha, was sitting next to Nalini in Haribabu's second photograph. During investigation, it was also found that Murugan had kept Santhan, an LTTE cadre, in the house of Haribabu. Involvement of another pro-LTTE DK activist Arivu also appeared in the investigation. From Padma, a code sheet used by Murugan for transmitting wireless messages, was recovered. It came to light that LTTE was frequently communicating with one another both in India and in Jaffna clandestinely over powerful wireless sets. Monitoring of the said wireless messages during investigation clearly showed that the top LTTE leadership including its Chief Prabhakaran, were fully involved in the planning and directing of the conspiracy to assassinate Shri Rajiv Gandhi. During investigation, Murugan disclosed a bag containing three letters given to Shanmugam's

employee, which was recovered after his arrest. One was addressed by Subna and Dhanu to Akila and the other to Pottu Amman, wherein they re-affirmed their steadfastness to the task assigned to them and they were waiting for the opportune moment. In their letter to Pottu Amman, reference was made to the dry run conducted at the public meeting addressed by the former Prime Minister, Shri V.P. Singh at Madras where Subha and Dhanu managed to hand over a garland to the Ex-Prime Minister while Sivarasan, Nalini, Haribabu and Arivu watched from the Press enclosure. The third letter was written by Bagyanathan to Baby Subramanian on 10-5-1991 reaffirming his loyalty to the cause of Tamil Elam. By 23-8-1991, Coimbatore, Muthatti and Berota villages in Mandya district and Konanakonte operations had already taken place. Thus, by 23-8-1991, the SIT was in possession of sufficient material disclosing, how the entire preparation and planning for assassination was made, and who were involved in the commission of the crime.

4.5 The Government was thus aware that some definite clues have found during the course of investigation and it cannot be said that the government had the least doubt that the first information lodged would be futile and nothing substantial would be forthcoming as a result of investigation. On the other hand, the manner in which progress was made in investigation, it can be said that the investigation would prove fruitful ultimately resulting into prosecution on the basis of material and evidence collected during investigation. Despite that, the government felt the need of appointing a Commission as the matter was a definite matter of public importance. The nation wanted to know as to who are the person, persons or agencies responsible for conceiving, preparing and planning the assassination of Shri Rajiv Gandhi, Former Prime Minister of India, and whether there was any conspiracy and. if so, with all its ramifications. If the Government wanted that the Commission may not enter into the areas which may be covered by investigation finally culminating into charge-sheet, those areas could have been excluded by the Government from the terms of reference of this Commission as the areas of Justice Verma Commission were excluded. But it would appear that it has not done so. If those areas are not inquired into by the Commission, the Commission would be failing in its statutory duty to make an inquiry which it is required to make under the notification, i.e. inquiry into the two terms of reference of this

Commission,

4.6 It is significant to note that in an inquiry under the Act, there is no list of charges to be adjudicated by the Commission by any definite judgment or order. There is no prosecutor or the accused. There is no plaintiff or the defendant. The function of the Commission is only to inquire and report to the Central Government for its information. The function of the Commission is to find facts or real truth. It is a fact finding body entrusted to give its honest and impartial view of the truth or otherwise on a matter of public importance mentioned in the Notification. The Commission's procedure is investigatory and inquisitorial rather than accusatory or judicial. Under the Commissions of Inquiry Act, the Commission of Inquiry is a statutory authority which acts as eyes and ears of the Government, to collect materials for information of the Government. The Commission has to collect materials by inquisitorial method, by investigation and it takes the role of investigator, prosecutor, defender and judge of facts with due safeguards of the rights of involved parties in the light of provisions contained in Sections 8-B and 8-C of the Act.

Examination of Case Law and the Legal Position

5.1 The matter may be further examined in the light of case law. Questions have arisen before Courts as to whether the conduct of inquiry by a Commission amounts to contempt of Court because of the pendency of identical question before a Court of Law, Civil or Criminal.

5.2 In *Sambhu Nath Jha v. Kedar Prasad Sinha*, : 1973 CriLJ453). a report was lodged with the police on 2-1-1966 by Lachho Paswan that when he and his brother Dwarka Paswan were going to Jamuii market, Kedar Prasad abused him and exhorted others to assault Dwarka Paswan and an assault was then made upon Dwarka Paswan and he was surrounded. Arjun Pandey thrust Sait in the chest of Dwarka Paswan as a result of which he died on the spot and the motive was that: both of them had voted against Kedar Prasad in the election of Mukhia. After investigation, charge-sheet was submitted under Sections 148 and 302 read with Section 149 I.P.C against a number of persons. No charge-sheet was submitted against Kedar Prasad and Arjun Pandey. During the proceeding,

the Magistrate summoned both of them as accused. Both of them filed revision petitions against the order of the Magistrate but the Additional Sessions Judge dismissed the revision petition. After the dismissal of the revision petition, an application for withdrawal of the case against Kedar Prasad and Arjun Pandey was filed. The Magistrate dismissed that application. The Order rejecting the withdrawal application was challenged in two revision petitions before the High Court which were admitted. During the pendency of the revision petitions, Commission of Inquiry was appointed under Section 3 to inquire into a number of charges against 14 persons who had earlier held the offices of Chief Minister and Minister in the State of Bihar and one of them was Shri Hasibur Rahman. One of the allegations related to the conduct of Hasibur Rahman in relation to Kedar Prasad Sinha and Arjun Pandey and in connection with that allegation it, was submitted that the publication of allegation related to a matter which was subject matter of criminal revision petitions in the High Court and had the result of interference with the course of justice and prejudicing the public against the two applicants. His Lordship Khanna, J. observed as under :

The subject-matter of the inquiry before the Commission as set forth in allegation No. J-4 was whether there was any misuse of official position on the part of Shri Hasibur Rahman when he directed against the recommendation of the Law Secretary and the District Magistrate, the withdrawal of the prosecution against Kedar Prasad & Arjun Pandey. The question for decision which, however, was the subject of criminal revision petitions pending in Patna High Court was whether the order of the Magistrate dismissing the application for withdrawal of prosecution was contrary to law. The two matters were distinct and separate and not identical. 'It may be that some of the matters which were connected with the criminal revision petitions were the subject of inquiry by the Commission of inquiry, but that would not attract liability for contempt of Court.'

5.3 In the case of Jagannath Rao v. State of Orissa, : [1968]3SCR789 , the appellant had challenged notification issued Section 3 of the Commissions of Inquiry Act appointing a Commission of Inquiry to inquire into certain allegations against persons who had held the offices of Chief Ministers and Ministers in Orissa. An argument was advanced in that case that on of the items of charges

which were to be inquired into by the Commission was the subject matter of an appeal pending in the High Court. Question arose in that context whether the setting up of the Commission of Inquiry by the State Government or the continuance of the inquiry by the Commission would tantamount to Contempt of Court. The Court held that the above acts would not constitute contempt of Court and observed :

'It was pointed out by this Court in *Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendulkar*, : [1959]1SCR279 that the inquiry cannot be looked upon as a judicial inquiry and the order ultimately passed cannot be enforced *proprio vigore*. 'The inquiry and the investigation by the Commission do not therefore amount to usurpation of the function of the Court of law. The scope of trial by the Courts of law and the Commission of Inquiry is altogether different.' In any case, it cannot be said that the Commission of Inquiry would be liable for contempt of Court if it proceeded to inquire into matters referred to it by the Government Notification. 'In appointing a Commission of Inquiry under Section 3 and in making the inquiry contemplated by the notification the Commission is performing its statutory duty.' We have already held that in appointing the Commission of Inquiry, the Government was acting *bona fide*. It is, therefore, not possible to accept the argument of the appellants that the setting up of the Commission of Inquiry by the State Government or the continuance of the inquiry by the Commission so constituted would be tantamount to Contempt of Court.'

5.4 In *Jang Bahadur Singh v. Baij Nath Tiwari* AIR 1969 SC 39, there was an inquiry by a Domestic Tribunal in exercise of powers statutorily vested in it under the U.P. Intermediate Education Act and the regulation framed there under into charges of misconduct against an employee. It was held that it does not amount to contempt of Court merely because an inquiry into the same charge is pending before a Civil or Criminal Court. The initiation and continuation of disciplinary proceedings in good faith cannot be taken to mean interference with the course of justice in the matter pending before the Court.

5.5 In *Tukaram G. Gaokar v. R.N. Shukla*, : 1968 CriLJ1234 , a Customs Officer initiated proceedings in good faith against a person involved in the smuggling of

gold. His criminal prosecution was imminent. It was held that such initiation of proceedings bona fide by the Customs Officer and in discharge of his statutory duty did not amount to contempt of Criminal Court even though identical issues might arise in the imminent prosecution. In that case, criminal prosecution on the basis of the FIR in respect of the offences in connection with the smuggling of gold under Section 120(B) I.P.C. read with Section 135, Sea Customs Act, Rule 131-B, defense of India Rules and Section 108, Foreign Exchange Regulation Act, was imminent,

5.6 Mr. K. Subramaniam, Advocate General for the State of Tamil Nadu has placed reliance on a Division Bench decision of the Calcutta High Court (Gokulananda Roy v. Tarapada Mukherjee, 76 C W 411, it was observed as under :--

'On the law as it stands now, there can be hardly any doubt that where a Commission of Inquiry has been appointed to inquire into matters of public importance there will not be any contempt of Court, even though the matters which are to be inquired into by the Inquiry Commission are the same, as those which are pending in a litigation before the Civil or Criminal Courts. It is now well settled that since the Commission of Inquiry, in conducting the inquiry, is performing a statutory duty, although such inquiry may be parallel in nature, the question of contempt of Court would not arise merely because of the pendency of identical questions before a Court of law, Civil or Criminal.

In this case, however, we are of the opinion that the subject-matter of inquiry by the Commission of Inquiry does not overlap or include matters which will have to be investigated by the Criminal Court in the trial of the appellant on a criminal charge. 'But having regard to the decisions of the Supreme Court, discussed earlier, even if the subject-matter of inquiry by the Commission of Inquiry is the same, which the Criminal Court may be required to go into on the prosecution of the appellant, a question of contempt of Court cannot arise and no injunction can be issued restraining the Commission of Inquiry from proceeding with the inquiry or restraining the State Government or any other authority from publishing the report of the Inquiry Commission'.

The learned Advocate General fortified his contention on this aspect of the case by a 'reference to Sub-section (1) of Section 3 of the Commission of Inquiry Act'. He argued that although the appropriate Government may appoint a Commission of Inquiry, where a resolution is passed by the legislature, the Commission of Inquiry must be appointed, even though the subject-matter referred to the Commission of Inquiry is the same as the subject-matter in litigation pending in a Court of law. 'It seems to us that there is good deal of force in this contention also on behalf of the respondents'.

5.7 The learned Judges, after discussing the cases : (J) Saibal Kumar Gupta and Ors. v. B.K. Sen and Anr., : 1961 CriLJ749 ; (2) P.V. Jagannath Rao and Ors. v. State of Orissa and Ors., : [1968]3SCR789 ; (3) Jang Bahadur Singh v. Baijnath Tiwari, : 1969 CriLJ267 ; and (4) Shambhu Nath Jha v. Kedar Prasad Sinha and Ors., : 1973 CriLJ453 , decided by the Supreme Court made the above observations.

5.8 The above case law relates to the question as to whether appointment of Commissions of Inquiry by the Government or conduct of inquiry by a commission amounts to contempt of Court when any matter is pending in a Court of Law or is imminent. Their Lordships held that the appointment of Commission and the conduct of inquiry by the commission is in exercise of the statutory power or authority and it amounts to a statutory act performed under the statute and, as such, the question of contempt does not arise. It would, thus, appear that because of pendency of any matter before a civil or criminal Court, the Commission is not divested of its jurisdiction.

5.9 It is further profitable to refer to a Full Bench decision of the Madras High Court in U. Dakshinamoorthy v. The Commission of Inquiry and Ors., reported in : AIR1980 Mad89).

5.10 In that case, to inquire into certain alleged incidents that took place at Tiruparankundram Police Station (in Madras) on 24.2.1979, the Government of Tamil Nadu issued a Notification in G.O.Ms. No. 695 Public (Law and Order-A) dated 9.4.1979 in exercise of powers conferred by Subsection (1) of Section 3 of the Commissions of Inquiry Act, 1952, appointing Thiru Justice C.J.R. Paul as the

Commission of Inquiry. The latter part of the second term of reference was, 'whether there has been any misconduct on the part of the Advocate Thiru V. Ayyadurai'. There was an allegation of assault by the Advocate on Thiru K. Rajagopal, Deputy Inspector of Police, who had also sent a complaint to the Bar Council of Tamil Nadu on the alleged misconduct of the Advocate Thiru V. Ayyadurai. The petitioner had filed two writ petitions. In the first, he challenged the validity of the Notification in respect of the above part of the second term of reference, and in the second writ petition, he sought to quash the order of the C.J.R. Paul Commission of Inquiry dated 31.5.1979 whereby the Commission had overruled the preliminary objection relating to jurisdiction and ruled that the Commission is under a statutory duty to conduct the inquiry as ordered in the Notification issued by the Government.

5.11 Mr. K. Parasaran, appearing for the petitioner, raised an objection as to the jurisdiction of the Commission of Inquiry to conduct an inquiry into the above part of the second term of reference wherein the Commission was required to inquire into the misconduct on the part of the Advocate. The challenge was on the ground that this can only be done by the Bar Council and not by the Commission of Inquiry Gokulakrishnan. J. speaking on behalf of the Full Bench consisting of Ramaprasad Roy, C.J., Ismail, Gokulakrishnan (himself), v. Ramaswami, Natarajan, Ratnavel Pandian and Mohan, JJ. in paras 26 and 27 observed as under :

' 'In the instant case, the reference to the Commission enjoins on it a duty to find as a fact whether there has been any misconduct on the part of an advocate'. It is conceded, as it ought to be that the Commission has no power under the Commissions of Inquiry Act, to decide on the action to be taken, even if it finds, in the course of its functioning as a Commission of Inquiry, that the misconduct of the Advocate was improper. Certainly the Bar Council, as a statutory functionary, can take notice of the findings of another statutory functionary like the Commission, and ponder over such information and act Suo Motu, if necessary, if it is satisfied, on the facts so found, that there has been professional or other misconduct on the part of the Advocate, as contemplated under Section 35 of the Advocates Act.

'It is, therefore, clear that the functions of the Commission of Inquiry, so far as the later part of Clause 2(ii) of this reference is concerned and those of the Bar Council, are mutually exclusive, and one is independent of the other'. Whilst a Commission of Inquiry only finds facts, and is interdicted from rendering a decision on such found facts, the Bar Council has a statutory right to act such information and take such action as is necessary under Section 35 of the Advocates Act, by referring the matter, if it has reason to believe that the Advocate has been guilty of professional or other misconduct, to the disciplinary committee for necessary action. 'If this dichotomy is borne in mind, then the contention that the Commission has no jurisdiction to go into the question whether there has been any misconduct on the part of the Advocate, will not arise at all'.'

5.12 The Full Bench held that the proceedings in G.O.Ms. No. 695 Public (Law and Order-A) published in the Tamil Nadu Gazette are valid in toto and the order dated 31.5.1979 of the first respondent namely, the Commission of Inquiry, is perfectly correct. Consequently, both the writ petitions were dismissed.

5.13 It is also pertinent to note that Hon'ble Mr. Justice K.K. Mathew has nowhere expressed or opined that the Commission lacks jurisdiction because of pendency of criminal trial. It simply did not consider it expedient or proper to make an inquiry.

5.14 Hon'ble Mr. Justice H.R. Khanna has observed in the Forward to Mr. S.C. Gupta's treatise. 'The Law relating to Commissions of Inquiry' : 'the areas of operation of civil or criminal trials and of the proceedings of such commissions may sometimes overlap but quite often they are not coextensive'.

5.15 As already stated earlier, Commission's jurisdiction under the Commissions of Inquiry Act is independent, as Civil and Criminal jurisdictions under the ordinary law and judicial set-up are independent, although same cause of action may be tried by both of them with the same set of witnesses, like in cases of assault, defamation, etc. in one jurisdiction for damages and in another for awarding; punishment.

5.16 It may also be stated here that inquiry by the Commission is not an inquiry under the Code of Criminal Procedure. The expressions 'Investigation' and 'Inquiry'

are denned by Section 2 Clauses (h) and (g) respectively of the Cr.P.C, but those definitions have no application to the Investigation and inquiry to be conducted by the Commission under the Commissions of Inquiry Act which lays down the provisions as to how investigation and inquiry are to be conducted.

TADA ACT :

6.1 I may now consider the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987. In order to check the growing menace of terrorism, the Act was enacted, its provisions have been strengthened in the 1987 Act. Apart from defining certain offences and providing punishments for terrorist and disruptive activities, this Act also makes provisions for the protection of the witnesses. Section 16 of the Act reads :

'(1) Notwithstanding anything contained in the Code, all proceedings before a Designated Court shall be conducted in camera :

Provided that where the Public Prosecutor so applies, any proceedings or part thereof may be held in open Court. (2) A Designated Court may, on on application made by a witness in any proceedings before it or by the Public Prosecutor in relation to such witness or on its own motion, take such measures as it deems fit for keeping the identity and address of any witness secret.

(3) In particular, and without prejudice to the generality of the provisions of Sub-section (2), the measures which a Designated Court may take under that Sub-section may include :

(a) the holding of the proceedings at a place to be decided by the Designated Court ;

(b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public ;

(c) the issuing of any directions for securing that the identity and addresses of the witnesses are not disclosed ;

(d) that it is in public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner.

(4) Any person who contravenes any direction issued under Subsection (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees'.

6.2 It would appear from the above provision that the proceedings before the Designated Court are required to be held in camera and measures are to be taken by the Designated Court for keeping the identity and addresses of the witness secret, and Sub-section 3 of Section 16 provides for specific measures which the Designated Court may take under Sub-section 2 of Section 16. The thrust of the Section appears to be that while trying the case, safety of the witnesses should be ensured and for that end in view, the names of the witnesses are not to be figured in orders, judgments or any records of the case accessible to the public and direction can be issued by the Court for securing that the identity and addresses of the witnesses are not disclosed and further order can also be passed by the Designated Court in public interest that all or any of the proceedings taken before the Court shall not be published in any manner.

6.3 Section 25 of the TADA Act provides that the provisions of the Act or any rule made there under or any order made under any such rule shall have effect notwithstanding anything inconsistent therefore contained in any enactment other than the TADA Act, or in any instrument having effect by virtue of any enactment other than the TADA Act. The effect of Section 25 is that the provisions of TADA Act will have an overriding effect over the provisions of any other enactment which are inconsistent with the provisions of the TADA Act.

6.4 The question is whether in the light of the above provisions of the TADA Act can it be said that all other forums and jurisdictions under other law have been divested of their jurisdiction. It may be stated that Parliament knew that the Commission of Inquiry Act, 1952 is on the statute book and definite matters of public importance may arise even when provisions of the TADA Act are attracted to such matters of public importance, i.e. a regular trial may be held by the Designated Court under the TADA Act. If the Parliament had so intended, it would

have incorporated specing provision denying all other forums of jurisdictions to conduct any inquiry into the matters which may be tried by the Designated Court. The purpose and Policy of the TADA Act in relation to witnesses appears to be that the life of the witnesses had to be protected and it may not in any way be endangered and with that end in view, provisions have been made under Section 16 It may be stated that other forum can equally exercise their jurisdiction giving due regard to the provisions contained in Section 16 of the JADA Act The proceedings by such jurisdictions may be held in camera and identity and addresses of the witnesses may be kept secret and not disclosed and the proceedings may not be published in the interest of the witnesses. If the other jurisdictions act with due regard to the provisions of Section 16, in my humble opinion, the object of the TADA Act would not be defected and the Commission of Inquiry would be competent to make an inquiry keeping m view the provisions contained under Section 16 of the TADA Act. The inquiry should be conducted in such a fashion so that the provisions of TADA Act particularly Section 16, are not violated ; rather they are observed and followed The Commission of Inquiry is required to hold the proceedings in camera without disclosing the identity and addresses of the witnesses and, further without publishing its proceedings. The provisions of the TADA Act thus can be given effect to even by the Commission of Inquiry. It was suggested that the Commission may defer its proceedings with regard to matters covered by the charge-sheet or the witnesses may be examined by the Commission after they are first examined at the trial. It is a different matter in what manner the inquiry may proceed. In whatever view of the matter, it cannot be said that the Commission of Inquiry is divested of its jurisdiction generally when the charge-sheet is filed and particularly m view of the provisions of the TADA Act. To my mind, there does not appear any conflict between the provisions of the Commissions of Inquiry Act, the Code of Criminal Procedure and the TADA Act. The provisions of these Acts can be even effect to in a harmonious way. The Commissions of Inquiry Act and the TADA Act are both special laws. Still provisions of Section 16 of the TADA Act shall prevail. In this manner, seeming inconsistency or repugnancy if any can be avoided and the two laws harmoniously can be given effect to Under the Regulations of Procedure framed by the Commission, proceedings can be held in camera which would mean that they are

not to be published.

Some of the Past Commissions and their Views :

7.1 Shri B. Datta, learned Counsel for the Central Government, submitted that in the present situation when charge-sheet has already been filed and trial is to commence, it would not be proper for the Commission to hold a parallel inquiry. Eminent Commissions in the past have refrained from making any inquiry. The Commission of Inquiry on the assassination of the Prime Minister Smt. Indira Gandhi, was held by Justice M.P. Thakkar. As the terms of reference of Justice Thakkar Commission of Inquiry, in Clauses 2(a) and 2(e) were similar to that of the terms of reference of this Commission of Inquiry, the parameters and role of the Commission as defined by the Thakkar Commission of Inquiry have to be reckoned as a persuasive precedent.

7.2 Clauses 2(a) and 2(e) of the terms of reference of the Justice Thakkar Commission of Inquiry were :

(a) The sequence of events leading to, and all the facts relating to, the assassination of the late Prime Minister ;

(b) Whether any person or persons or agencies were responsible for conceiving, preparing and planning the assassination and whether there was any conspiracy in this behalf, and if so, all its ramifications.

7.3 While considering the parameters of the role of the Commission, Justice Thakkar observed :

'1.7 Parameters of the role of the Commission in regard to Clause 2(e) of the Terms of Reference, viz. :

'Whether any person or persons or agencies were responsible for conceiving, preparing and planning the assassination and whether there was any conspiracy in this behalf and if so, all its ramifications'. need to be defined at the outset. Once it becomes clear as to what the Commission cannot and need not do, it might become easier to comprehend the scope of what the Commission can do in the

context of the aforesaid term of reference. The Commission cannot;--

(1) take upon itself the role of the regular Criminal Court and record a finding of guilt in respect of any person considered to be involved in the crime or punish him.

(2) hold a regular trial in respect of a person accused or suspected to have perpetrated the crime. Persons who have already been accused of having participated in the crime will have to stand their trial in the regular Criminal Court. 'The Commission cannot do what the regular Criminal Court is already doing or may do in due course. The role of the Commission is restricted to probing into the question as to whether any person or persons (or agencies) other than the named accused were also involved in the crime of assassination. Such persons (or agencies) may have been associated with the culprits in conceiving, preparing, planning or execution of the crime. Or they may have been parties to the conspiracy to commit the crime of assassination or they may have facilitated the crime. The scope of the inquiry by the Commission would be restricted to ascertaining whether some persons other than those who are already charged with having committed the offence and are standing trial had directly or indirectly participated in the perpetration of the crime and identifying such person or persons or agencies if possible. 'The Commission had to collect information and gather material by recourse to powers exercisable under the Commissions of Inquiry Act, 1952 with this end in view.'

7.4 It was also observed in Chapter III, paragraph 1.2 as follows :

'1.2 It is understood that a Special Investigation Team (SIT) which is in charge of the investigation pertaining to the assassination of the late PM, suspects the involvement of a number of individuals in the conspiracy to commit the crime. 'It will not be appropriate for the Commission to advert to the material gathered by the SIT in respect of the said suspects or to express any opinion in regard to the circumstances appearing against them.' The SIT will no doubt proceed against them in accordance with the law and file a charge-sheet in due course if so warranted. The Commission deems it proper to refrain from saying anything more on this subject in the present report.'

7.5 As regards the proceedings conducted by Justice Thakkar Commission of Inquiry, it may be stated that evidence was recorded by Justice Thakkar and findings were reached on that basis. There was a direct testimony of the eye witnesses Narain Singh and Rameshwar Dayal which was considered by Justice Thakkar. The circumstantial evidence and the confessional statement of Satwant Singh which came on record, was also considered and on that basis this finding was reached that Beant Singh with his revolver and Satwant Singh with his steno gun, had fired on the late Prime Minister when she was approaching the TMC gate and caused the fatal injuries to which she ultimately succumbed. However, Thakkar, J. observed that:

'the Commission cannot hold a parallel trial. The report recording its conclusions is based on pre-inquiry investigative exercise and not on an inquiry under Section 8B of the Commissions of Inquiry Act which is neither feasible nor practicable. For, the Commission strongly feels that the role of the Commission is over in the sense that the Commission with the constraints and limitations inherent in its office, cannot do more. The rest has to be done by the investigating agency.'

7.6 Justice Thakkar while considering the parameters dealt with what the Commission cannot do and what the Commission need not do. There cannot be any dispute with regard to what the Commission cannot do, as stated by him, but to me it appears that Justice Thakkar thought it only expedient not to make a probe regarding the matters mentioned in the terms of reference in view of the investigation done by the SIT and only confined the investigation in respect of persons other than those already charged.

7.7 Shri B. Datta also referred to the report of the One-Man Commission of Inquiry headed by Hon'ble Mr. Justice K.K. Mathew to inquire into the incidents of explosions that took place on 2.1.1975 at Samastipur in which Shri L.N. Mishra, the then Railway Minister, was killed. Justice Mathew observed that :

'When the established Criminal Court is seized of the case and has to go into the facts and circumstances pertaining to the exposition in order to find the guilt or innocence of the accused, the Commission does not think 'it expedient or proper' that it should also examine the same evidence for arriving at the finding on facts

and circumstances of the case as 'any finding by the Commission would certainly embarrass the trial Court. If an inquiry has to be conducted by the Commission and a finding as regards the facts and circumstances relating to the explosion has to be arrived at on the basis of the evidence to be adduced before the Criminal Court, then the invisible effect of such a finding as a brooding omnipresence in the mind of the trial Court cannot be denied by any one who makes a realistic approach to the question. If in the inquiry, the Commission were to come to the conclusion different from that to be reached by the Criminal Court', notwithstanding the marginal difference in the standard of proof between the two proceedings which will be discussed more fully hereafter, 'neither the finding of the Commission nor the judgment of the Criminal Court would inspire confidence in the public. This would defeat the very purpose of appointing the Commission.'

The work of finding the facts and circumstances pertaining to the explosion by the Commission would, for all practical purposes, involve a finding on the guilt or otherwise of the accused. A finding by the Commission that the accused were involved in the commission of the crime, though made in a proceeding 'predominantly civil in nature', as it would irreparably damage their reputation by tainting them with the guilt of murder, would require a standard of proof practically akin to the one to be adopted by the Criminal Court in finding the guilt of the accused. Although generally speaking the Commission is only an investigating agency to find facts, as already noted, 'its proceedings here will have to assume a quasi-judicial character. The standard of proof required is one beyond reasonable doubt' as the Commission has to find facts and circumstances which might brand the accused with guilt for the Commission of perhaps the gravest of all offences, viz., murder. In *Bater v. Bater*, (1950) 2 All. ER 458, Lord Denning upheld the observations made by the Commissioner in dismissing the 'divorce petition' brought by the wife on the ground of cruelty that she must prove her case beyond reasonable doubt. The learned Judge said that the degree of proof required, even if the proceeding is civil in character, must depend on the mind of the reasonable and just man who is considering the particular subject-matter. He said that the matter cannot be put better than in the words of Sir William Scott in *Loveden v. Loveden*, (1810) 2 Hag. Con. 1, viz.

'The only general rule that can be laid upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.....' and that this would depend largely upon the gravity of the charge a person has to meet even if the proceeding is civil in character. He further said that a 'reasonable doubt' is simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion. It does not say that the degree of probability must be as high as 99 per cent or as low as 51 per cent. The degree depends on the mind of the reasonable and just man who is considering the particular subject matter. When this is realised, the phrase 'reasonable doubt' can be used as aptly in a civil or a divorce case as in a criminal case. The principle of this decision was approved in *Hornel v. Neuberger Products*, (1956)3 All ER 970 and by the House of Lords in *Blyth v. Blyth*, (1966) 1 All ER 524. 'There is all the more reason here for proof of a most exacting nature as there is no appeal from a finding of the Commission.

It is said that the object of an inquiry under the Commission of Inquiry Act is a probe to find the truth whereas that of a criminal trial is to find the guilt of the accused. The Commission thinks that the 'object of every criminal trial is to find the truth of the facts and circumstances relating to the occurrence and then find the guilt or otherwise of the accused by applying the relevant law. Truth is not self-evident and can be reached by Court mostly through fallible media of human agency and a Criminal Court by applying the more rigorous standard of proof beyond reasonable doubt might not be satisfied about the truth of facts as easily as a Commission conducting investigation. It is because of this exacting standard of proof that when a Criminal Court feels a reasonable doubt that the evidence before it does not reveal the truth or the whole truth, the accused is entitled to an acquittal. That does not in the least mean that the object of Criminal Court is not to find out the truth of the facts and circumstances of the occurrence. It might be that even after all the facts have been truly found by the Criminal Court, the accused might be acquitted on some technical plea but that does not derogate from the fact that the duty of every Criminal Court is to find the truth of the facts alleged by the prosecution to bring home the guilt. If this is so, when the truth of the facts and circumstances is found by the Commission in a proceeding which is quasi-judicial in nature by applying the standard of proof beyond reasonable doubt as already

explained, any finding by a Criminal Court of the truth of the facts and circumstances of the case based on identical evidence cannot normally be different as 'there is only minimal difference in the degree of standard of proof to be adopted in both the forums. If the finding of the Commission on the facts and circumstances is against the accused, the mind of the public will be prejudiced against them with its usual adverse effect upon them in the trial of the criminal case. Justice to individuals caught up in an inquiry is as important as the public interest to be served by the Commission of Inquiry itself.

The situation when the terms of reference were framed by the Government and the Commission was appointed was totally different from the one obtaining today. At that time the perpetrators of the crime were not known either to the police or to the public. There was wild speculation among the public as to the perpetrators of the crime and it had political overtones. 'Now, an independent investigating agency has found, after a thorough investigation that it was the accused who were concerned in the Commission of the crime and it is on that basis that the charge-sheet has been filed before the Court. Whether the facts and circumstances stated in the charge-sheet are true is a matter to be decided by the Trial Court after taking evidence. While interpreting the terms of reference, one has to take into account the subsequent developments. One principle which is helpful in construing the terms of reference is to ask and answer the question viz. if the situation obtaining today were present to the mind of the Government when it framed the terms of reference, whether it would have asked the Commission to go into the facts and circumstances pertaining to the explosion. What has really to be done under such circumstances to answer the question is not to ascertain what the terms of reference meant on the basis of the situation obtaining at the time when the reference was framed, but to guess what the Government would have intended if the situation obtaining today were present in its mind, 'It is extremely doubtful if the Government had known that a Criminal Court would be seized of the matter on the basis of a charge-sheet containing the facts and circumstances made after full investigation by an independent investigating agency, it would have required the Commission to conduct an inquiry on the basis of identical evidence, as generally speaking, matters pending in Criminal Court for decision are not made the subject matter of a reference of the Commission of Inquiry Act.' This was

perhaps the reason why in the terms of reference of the Commission appointed under the Ministry of Finance Order dated 11th Dec., 1956 to go into the irregularities committed by certain companies controlled by Shri Rama Krishna Dalmia and others, matters pending before the Criminal Court were excluded from Clause 10 of the terms of reference which was as under :--

'(10) Any irregularities, frauds or breaches of trust or action in disregard of honest commercial practices or contravention of any law (except contraventions in respect of which criminal proceedings are pending in a Court of law) in respect of companies and firms whose affairs are investigated by the Commission which may come to the knowledge of the Commission and the action which in the opinion of the Commission should be taken as and by way of securing redress or punishment or to act as a preventive in future cases.' (See R.K. Dalmia v. Justice Tendulkar, : [1959]1SCR279 . It is very pertinent, may very significant to note that in spite of written invitation to the public published in all important newspapers no person or agency has come forward with any alternative theory as to how the explosion took place and the person or persons concerned in it which is either plausible or worthy of consideration.' It must also be remembered that there is no investigation agency under the control of the Commission. 'If the theory of the prosecution before the Criminal Court as to how the explosion took place is rejected by the Commission, the Commission will not be able to find the facts and circumstances relating to the explosion as there is no other alternative theory before it. This in effect means that in order to find the facts and circumstances pertaining to the explosion as required by the terms of reference the only option left to the Commission is to accept the version of the prosecution before the criminal Court. In other words, if the Commission were to find that the prosecution case is not acceptable, then there is no way of answering the terms of reference relating to facts and circumstances.

The Commission gave anxious thoughts to all the aspects of the question but in view of the circumstances stated above, the conclusion became inescapable that it is neither just nor expedient to enter any finding on the facts and circumstances pertaining to the explosion.

7.8 The Commission then concluded that having given an anxious thought to all the aspects of the question and in view of the circumstances considered by it, the conclusion became inescapable that it is neither just nor expedient to enter any finding on the facts and circumstances pertaining to the explosion.

7.9 Coming to the question of propriety, expediency or justness in conducting proceedings by the Commission in matters pending before a Court of Law, it may be stated that when statutory functions are being performed by the Commission and when Commission is duty-bound to make an inquiry, the provision being mandatory, the question of propriety does not arise. The Commission must perform its statutory functions which are within its sphere of action or within the framework of the terms of reference. The mode of inquiry may depend on the exigencies of the situation, that may arise, according to the Commission's satisfaction.

7.10 Hon'ble Mr. Justice K.K. Mathew proceeded not to make an inquiry inter alias on the ground that the Commission has no investigating agency of its own. Suffice it to say that the Commission of Inquiry Act does make a provision that the Commission can utilize the services of existing investigating agencies or may utilize the services of officers for conducting investigation under its domain. Whether there is any alternative theory or the theory propounded by the prosecution is correct or not, can be examined by the Commission by conducting its own investigation and inquiry. If no investigation is conducted by the Commission, nothing would come out in the form of alternative theory or about the correctness of the prosecution story if the matter falls within the terms of reference.

7.11 Justice Mathew also proceeded to consider that it will have to examine all the witnesses, else the defense would be prejudiced and without that an opportunity of hearing would be of no value to the accused persons. In my opinion, the Commission can examine the material witnesses and arrive at its findings provided that the evidence produced is credible and it is not necessary for the Commission to examine all the witnesses cited in the charge-sheet. There may be a number of witnesses relating to one particular fact. Even the prosecutor has the power to give

up witnesses in such a situation in a trial before the Criminal Court. The Commission, of course, likewise act and reduce the number of witnesses relating to the same fact. It may be that the result of probe by the Commission may be same as may be arrived at by the Court but it can also be different. This also cannot be lost sight of that the technical rules of evidence do not come in the way of the Commission's proceedings and the findings regarding truth can be arrived at on the basis of such evidence divorced from technicality. Rules of admissibility of evidence have no applicability in the proceedings before the Commission and truth can be reached, divorced from technical rules of evidence, and viewing the matter in this light, the conclusions of the Court and of the Commission may be different.

7.12 Justice Mathew also considered the question of burden and standard of proof. The question of burden and standard of proof is relevant for purposes of arriving at findings. If truth can otherwise be established in any manner, the question of burden and standard of proof would not arise. If the Commission is convinced regarding truth or otherwise of a particular fact by convincing, cogent and credible evidence, the finding would be accordingly recorded and in case the evidence is weak and insufficient, no positive finding can be recorded.

7.13 It would be profitable to take into account some relevant facts of some other Commissions and the most relevant is the Commission headed by Justice D.P. Madon on the Bhiwandi riots in May, 1970. The Commission was to inquire into and report on the causes of the riots. In the course of the evidence, a police witness of the Special Investigation Squad deposed that in the criminal case which was simultaneously afoot, it had been alleged that a conspiracy had been hatched by some muslims 'to assault the Shiv Jayanti procession as also some Hindu localities.' In view of the terms of reference, Justice Madon insisted that the evidence in the trial Court on the aspect of conspiracy be led before him by the Maharashtra Government as conspiracy would be the direct and most important cause of the riots. Notices were also given to all the two hundred and odd accused. The conspiracy case was opened before the Commission on July 30, 1971. The case of the Special Investigation Squad on the charge of conspiracy fell. The Commission found that the conspiracy charge and the evidence in support of it had been concocted by some of the officers of the squad and others

along with some of the local leaders of the Jan Sangh and Shiv Sena. The Government withdrew the conspiracy charge before the Commission on 27.8.1971 as well as before the Court on 22.9.1971.

7.14. The Madon Commission went into the efficiency and impartiality of police investigations and carefully examined the case diaries. The Commission also considered the difference between an inquiry under the Commissions of Inquiry Act and a trial in a Court of Law. It was observed :

'In the absence of any statutory provisions in this behalf the Commission had to formulate its own procedure, A Judge appointed as a Commission of Inquiry would naturally prefer to assimilate the inquiry as far as possible to a judicial process. The nature of the inquiry to be conducted by a Commission set up under the Commissions of Inquiry Act, 1952 however is fundamentally different from the trial of either a civil or a criminal case. Under Section 3 of the Commissions of Inquiry Act, a Commission of Inquiry is appointed by the Central or State Government, as the case may be, by a notification published in the Official Gazette, 'for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification.' Thus, unlike in the case of a trial in a Court of Law, a Commission has itself to hold an inquiry into the matters referred to it by the notification appointing it, arrive at its findings thereon and submit its report to the Government.

A Commission of Inquiry differs from a judicial tribunal in three important respects. The first point of difference is that while a Court of Law decided purely on the rival cases presented before it by the litigating parties and on the evidence led by them before it, a Commission of Inquiry, even though parties may appear before it and lead their evidence, cannot rest content with this. Its function is not merely to hear the rival cases, consider the evidence led by the contesting parties and then pronounce upon it : 'it has itself to ascertain the truth on matters referred to it. In order to do so, in addition to the evidence which may be led before it by the parties, the Commission must make its own inquiries.' As was observed by Lord Denning in his report on the Operation of the Security Service arising out of the Resignation of the U.K. Secretary of State for War, Mr. J.D. Profumo, the

appointment of a Tribunal under the Tribunals of Inquiry (Evidence) Act, 1921 of England 'is an elaborate and costly machine, equipped with all the engines of the law--Counsel, solicitors, witnesses on oath, absolute privilege, openness to the public (so far as possible) and committal for contempt'--but it suffers from the invincible drawback, in doing Justice, that there is no prosecution, no charge and no defense'. Lord Denning pointed out that 'in carrying out the inquiry he had to be detective, inquisitor, Advocate and Judge : capacities, he said, he found difficult to combine. The second point of difference is that a Commission of Inquiry has no power to make an enforceable order, neither can it impose any penalty nor award any damages or costs. The only power which the Commission has to inquire and make a report and embody therein its recommendations without having any power to enforce them (Ram Krishna Dalmia & others v. Justice S.R. Tendulkar, : [1959]1SCR279 . The report of a Commission of Inquiry is not binding upon the Government and the Government is not bound to implement the recommendations made in the report ; though now under Subsection (4) of Section 3 inserted by the Commissions of Inquiry (Amendment) Act, 1971, the Government is bound to lay before the House of the People in the case of a Commission appointed by the Central Government, or the State Legislative Assembly in the case of a Commission appointed by the State Government, the report of the Commission together with a memorandum of the action taken thereon within a period of six months of the submission of the report by the Commission. The third point of difference is that there is not set procedure prescribed for a Commission of Inquiry. Neither the Civil Procedure Code nor the Criminal Procedure Code applies to its inquiry and each Commission is left to formulate its own procedure. Under our jurisprudence a hearing before a Court of Law is based on the adversary system ; but in the case of an inquiry conducted by a Commission of Inquiry, even where parties with conflicting interests appear before it and thus lend to its inquiry the flavour of the adversary system, basically the inquiry is inquisitorial in its nature. If the Commission were merely to rest content with such evidence as the parties produce before it and not itself summon such witnesses as it thinks will be useful for shedding light on the matters into which it has to inquire, the truth will never emerge in many an inquiry.'

7.15 Justice Y.V. Chandrachud headed the Commission of Inquiry relating to the death of Shri Deen Dayal Upadhyaya, President, Bhartiya Jan Sangh, who died during a train journey in the night between 10th and 11th February, 1968. After investigation, the CBI put up two common thieves, namely, Bharat Lal Don and Ram Avadh for trial before the Special Sessions Judge, Varanasi on June 9, 1969. The learned Judge held that Shri Deen Dayal Upadhyay died a homicidal death, but he acquitted both the accused of the charge of murder as well as of the charge that they had committed theft after making preparations for causing death in order to the committing of the theft. Bharat Lal was convicted under Section 379 I.P.C. for committing theft of Shri Upadhyay's belongings and was sentenced to the term of four years. His appeal was pending before the High Court of Allahabad. The Commission of Inquiry was appointed on 23.10.1969 to inquire into all the facts and circumstances relating to the death of Shri Deen Dayal Upadhyay. While dealing with the scope of reference, Chandrachud, J. observed ;

'that the learned Sessions Judge has indicated in his Judgment (para 195) that the failure of the charge regarding murder in this case does not in any sense imply that the theory of the accused having been killers is false or that it was a political crime.' He also observed 'that the charge of murder failed because of paucity of evidence and that there was no warrant for the criticism that the investigating agency in this case deliberately and purposely avoided the political origin of the crime, set up a false theory of a chance murder by thieves and pinned the same on two scapegoats. He however proceeded to say that a 'Criminal trial is not a probe or inquiry into the truth about the occurrence, that the sole question before him was whether the evidence on record establishes the guilt of the accused, that a Court of Law cannot, by reason of the rules of evidence which apply to Court proceedings, look at data which may be highly pertinent and conducive to a persuasion of the ascertainable truth and that the offence of murder not having been proved against the accused, the problem of truth about the murder still remains'.'

"The learned Sessions Judge felt handicapped that by reason of the provisions of the Evidence Act, he could not look at data which may be highly pertinent and conducive to a persuasion of the ascertainable truth. I suffer from no such

restriction for the rules of evidence do not strictly apply to the proceedings before me,'

Justice Chandrachud observed that 'the scope of this inquiry is wider than the scope of the Sessions Trial. I must determine why the murder was committed a question that has wider ramifications than the question before the Sessions Court, namely, whether the accused before it were guilty of the crime imputed to them'. It was enough for the Sessions Court to hold that the offence of murder was not brought home to the accused beyond a reasonable doubt and that Bharat alone was guilty of simple theft. Any further inquiry was uncalled for. That is why 'the learned Judge observed that a criminal trial is not a probe on inquiry into the truth about occurrence. My inquiry is what a criminal trial cannot be I can conduct a probe into the real truth. Bharat and Ram Awadh may or may not be guilty. For me that is beside the point. My task is to find why the murder was committed, whosoever might have committed it. This task will of course become easier if the hand of a political group can be seen behind the crime.' Likewise, the task will be lightened if it appears that the murder was accompanied by a simple theft.

This approach will eliminate a possible conflict of jurisdiction between the Commission and the Court. The order of acquittal in favor of Ram Awadh and the acquittal of Bharat of the charges under Sections 302 and 382 of the Penal Code have become final. Bharat's appeal against his conviction and sentence under Section 397 is pending in the Allahabad High Court. Fortunately, my inquiry covers a different field and I hope that nothing that I say will embarrass. Their Lordships of the Allahabad High Court while hearing Bharat's appeal. I will 'take care to steer clear of that course', subject of course to the 'basic requirements of the inquiry into the facts and circumstances relating to the murder of Shri Upadhyay'.

7.16 It would appear that the learned Judge wanted to steer clear without overlooking the basic requirements of the inquiry into the facts and circumstances relating to the murder of Shri Upadhyay. However, in my humble opinion, findings may be different based on different acceptable and admissible evidence as stated by the Sessions Judge. The Commission may arrive at the truth while the same may not be established in a Court of Law for want of legally admissible evidence.

7.17 Some facts regarding Warren Commission, to my mind, are also relevant and pertinent:

7.18 President J.F. Kennedy, 46. of the USA was shot and killed by an assassin in Dallas, on 22.11.1963. To inquire into the assassination, a Commission was appointed on 29.11.1963 by the President L.B. Johnson, consisting of Chief Justice Warren of the U.S. Supreme Court and six other members. The Commission was to evaluate all the facts and circumstances surrounding the assassination and the subsequent killing of the alleged assassin and to report its findings to the President. On 13.12.1963, the Congress enacted Senate Joint Resolution empowering the Commission to issue subpoenas requiring the testimony of witnesses and production of evidence relating to any matter under its investigation. It is significant to note that the Commission's staff reviewed in detail the actions of several federal agencies, particularly the Federal Bureau of Investigation, the Secret Service, the Central Intelligence Agency and the Department of State. Initially, the Commission requested the agencies to furnish all their reports relating to the assassination and their relationship with Oswald or Ruby. The Commission issued specific questionnaire to the agency involved on the basis of these reports. Members of the staff followed up the answers by reviewing the relevant files of each agency for additional information. In some instances, members of the Commission also reviewed the files in person. Finally, responsible officials of these agencies were called to testify under oath. Dean Rusk, Secretary of State; C. Douglas Dillon, Secretary of the Treasury; John A. McCone, Director of the Central Intelligence Agency; J. Edgar Hoover, Director of the Federal Bureau of Investigation, and James J. Rowley, Chief of the Secret Service appeared as witnesses and testified fully regarding their agencies' participation in the matters under scrutiny by the Commission.

7.19 The Commission examined 552 witnesses. The hearings of the Commission were closed to the public as the premature publication by it of testimony of witnesses might interfere with Ruby's rights to a fair and impartial trial on the charges filed against him by the State of Texas. The Commission also recognized that testimony would be presented before it which would be inadmissible in judicial proceeding and might prejudice the innocent parties if made public out of context.

Regarding its functions, Warren Commission stated :

'The Commission has functioned neither as a Court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a fact-finding agency committed to the ascertainment of the truth. In the course of the investigation of the facts and rumours surrounding these matters, it was necessary to explore here say and other sources of information not admissible in a Court proceeding obtained from persons who saw or heard and others in a position to observe what occurred.'

Prejudice :

8.1 The question of prejudice may further be considered in case the findings are recorded by the Commission first, and report thereof is submitted, which may be contrary to what is expected at the trial which may prejudice the judgment of the Trial Court. In order to avoid any such possibility, the report of the Commission may not be published till the judgment is pronounced by the Trial Court Even otherwise, as considered above, the scope and nature of inquiry conducted by the Commission of Inquiry is different from the trial. The findings by the Commission have no effect on the trial whatsoever and the Court may proceed independently, The findings would be recorded on the basis of the evidence led before the Court and by the Commission on the evidence led before the Commission of Inquiry and the material that can be looked into by these two different forums may be different in view of the question of admissibility of evidence.

8.2 The question of prejudice may also be considered in the light of Section 6 of the Commissions of Inquiry Act which makes it abundantly clear that statements made before the Commission cannot be made use of even for purposes of contradiction. It has been authoritatively laid down by their Lordships of the Supreme Court in R. K. Dalmia's case and in Kehar Singh v. Delhi Administration, : 1989 CriLJ1 .

Summing Up :

9.1 Inquiry by the Commission carries with it greater confidence in the public mind. But in ordinary criminal investigations, the possibility that it may be one-sided, tainted, biased and unfair, may even be based on concocted evidence, cannot be ruled out. Wrong persons may be prosecuted and real culprits may be shielded. Even at the trial after filing of the charge-sheet, there may be cases when witnesses may be won over, they may be bribed, they may be terrorised, they may be eliminated or made to disappear affecting the outcome of the trial. In such a situation, the Commission may act on the basis of the statement recorded by the police, if the statement of the investigator is found trustworthy.

9.2 Thus, looking to the public importance and sensitive character of the inquiry, a thorough probe is needed leaving no areas including the areas covered by the charge-sheet which are related to the terms of reference. The Commission has to satisfy itself after deeper probe as to who are the persons or agencies responsible for conceiving, preparing and planning the assassination and whether there was any conspiracy. Investigation by the SIT in the assassination case may be thorough, fair and impartial and the findings of the Commission may not vary with that of the investigation, but that does not mean that the Commission should not make any inquiry.

9.3 In view of what I have considered above, I am clearly and firmly of the opinion that despite submission of charge-sheet under Section 173 of Cr.P.C. and despite provisions of the TADA Act, this Commission is competent enough and has jurisdiction to make an inquiry into the matters referred to it, rather it is obligatory to do so, The manner of making inquiry rests with the Commission. Even expediency or propriety does not warrant that such an inquiry need not be conducted. On the contrary, I feel that this Commission., having regard to its terms of reference, is duty-bound to make an inquiry under the Notification. As already stated, the mode and extent of inquiry would depend on the exigency of the situation. I thereforee overrule the contentions of Shri B. Datta in this regard.

Investigation Record to be made available :

10.1 The next important question to be considered is about the production of case diary, documents and other records and materials collected by the SIT during

investigation for consideration of the Commission as without that it would not be possible for the Commission to find out as to what areas can be investigated by the Commission outside the charge-sheet and who are those persons or agencies responsible for conceiving, preparing and planning the assassination other than those who have been prosecuted by the SIT. Involvement of the suspects who have not been prosecuted can be known from the investigation record and it can be seen as to what evidence is available against such suspects.

10.2 Shri B. Dutta, learned Counsel for the Central Government, submitted that case diary can be made use of only in accordance with Section 172(3) of the Cr.P.C. and not otherwise. According to that provision, the accused or his agents are not entitled to call for the case diary nor they are entitled to see it. It is only the Court which can look into the case diary if it is used by the police officer who made it to refresh his memory and the Court can make use of it for the purpose of contradicting such police officer. It can be made use of with reference to the provisions of Section 161 of the Cr.P.C. and Section 145 of the Indian Evidence Act. Reliance was placed by Shri B. Dutta on a decision of the Supreme Court in *Mukund Lal v. Union of India*, : AIR 1989 SC144 . In my opinion, the submission of Mr. Dutta is devoid of any force. Section 172(3) of the Cr.P.C. had no application to the proceedings before the Commission. The Commission can make use of the case diary and other documents by summoning the same in exercise of powers conferred on it by Section 4 of the Commissions of Inquiry Act, reference of which was made earlier while dealing with powers of the Commission. Section 4 clearly provides that the Commission shall have the powers of a Civil Court regarding requisitioning any public record or copy thereof from any Court or office or requiring the discovery and production of any document and further information can be sought by the Commission in exercise of the powers under Sub-section 2 of Section 5 from any person on such points or matters which may be useful for or relevant to the subject matter of inquiry.

10.3 Sari K.L. Arora, learned Counsel for the Commission, submit-that the SIT is duty-bound to produce the case diary and other investigation record. Reliance was placed by him on a Division Bench decision of the Delhi High Court in *Union of India v. Delhi Bar and Others*. 1989 (3) Delhi Lawyer 306. The Division Bench

followed the decision of the Supreme Court in *Khatri v. State of Bihar*, : [1981]3SCR145 . It was observed by Delhi High Court in the aforesaid decision as under :

'The Supreme Court has also clarified the meaning and scope of investigation under Chapter XII of the Cr.P.C. and the prohibitions mentioned in the Chapter. The Supreme Court has held by the express terms of the Section this bar is applicable only where such statement is sought to be used 'at any 'enquiry,' or 'trial' in respect of any offence under investigation at the time when such statement was made'. If the statement made before a police officer in the course of an investigation under Chapter XII is sought to be used in any proceeding other than an inquiry or trial or even at an inquiry or trial but in respect of an offence other than that which was under investigation at the time when such statement was made, the bar of Section 162 would not be attracted'., ' it has no application for example, in a civil proceeding under Articles 32 or 226 of the Constitution and a statement made before a police officer in the course of investigation can be used as evidence in such proceedings, provided it is otherwise relevant under the Indian Evidence Act,'

'Applying the ratio of the Supreme Court decision, the bar under Sections 161, 162. 172 & 173 or other provisions of Chapter XII, Cr. P.C. do not apply against any production of the statements or police diaries ordered to be produced by Commission/Committee of Inquiry. It is not a criminal Court nor even a Civil Court. There is no 'inquiry' or 'trial' of an 'offence' before a Committee acting under the Commissions of Inquiry Act. It is merely a fact finding body whose function is to establish truth on matters of public importance though all relevant material. Even the Evidence Act is not applicable to these proceedings. It has all the powers of summoning the witnesses and production of documents similar to the Civil Court. But a Commission/Committee is the master of its own procedure,'

10.4 In view of the above legal position, in my opinion, the SIT has to produce the case diary, documents and other records and materials which it has collected during investigation for examination by the Commission. Mr. B. Datta submitted that this can be done only after conclusion of trial which may take about six

months' time, else the conduct of trial will be prejudiced. Taking into account the submissions of Mr. Datta, it may be stated that the SIT may produce these records keeping in view the requirements of the trial and simultaneously also seeing that the inquiry by this Commission may not be hampered or delayed.

An Analysis of the Terms of Reference of this Commission and Justice Verma Commission

11.1 I may now consider the scope of the terms of reference of this Commission in view of the terms of reference of Justice Verma Commission. A bare perusal of the terms would show that the matters covered by Justice J.S. Verma Commission have been expressly excluded in the terms of reference of this Commission. What legitimately falls within the terms of reference of Justice Verma Commission thus would not be taken into consideration by this Commission but there may be areas which may not so legitimately fall and incidentally might have been taken into consideration by Justice Verma Commission. In my opinion, those areas would not be beyond the purview of this Commission.

11.2 While considering the scope of inquiry and the real question in Chapter V of Justice Verma Commission report, it was stated as under :

'To determine the true scope of the inquiry by this Commission, the terms of reference of Justice M.C. Jain Commission constituted by a notification dated August 23, 1991 have also to be kept in view. The terms of the two Commissions are mutually exclusive. In addition, a Special Investigation Team of the Central Bureau of Investigation headed by D.R. Karthikeyan was set up to investigate into the crime. Matters which are directly within the purview of the Jain Commission and those pertaining to investigation of the crime are not within the purview of this Commission. Even in the overlapping grey areas, care has to be taken to preserve the distinction. This is the only reasonable construction to make of the ambit of the terms of reference of this Commission to avoid any overlapping or conflict with areas expressly covered by the terms of reference of Justice M.C. Jain Commission and investigation of the crime by the S.I.T.'.

11.3 On consideration of the terms of reference of the two Commissions, in my opinion, the thrust in the first Commission of Justice J.S. Verma is on security aspect and the thrust in the terms of reference of this Commission is on conspiracy aspect and also on consideration of those factors and matters which led to the assassination and which are related to assassination. It was observed in the report of Justice Verma Commission that the main matter for inquiry is whether the assassination could have been averted and to answer the main question the Commission has to decide whether there were lapses or dereliction of duty in this regard on the part of any of the individuals responsible for his security which was the proximate cause for the mishap. Incidentally dealing with various matters does not mean that they relate to the main terms of reference. The distinction in the terms of reference of the two Commissions has to be maintained although some matters may be incidentally dealt with.

11.4 So far as the terms of reference of this Commission are concerned, it would appear that there are two parts of the first term of reference--the first part relates to the sequence of events leading to the assassination' and the second part relates to 'all the facts and circumstances relating to the assassination'. The second term of reference is to find out 'person or persons or agencies responsible for conceiving, preparing and planning the assassination and whether there was any conspiracy'.

11.5 With regard to the expression 'conspiracy', Mr. K. Subramanian referred to the meaning of the expression conspiracy in the Black's Dictionary as under :

'A conspiracy may be a continuing one ; actors may drop out, and others drop in ; the details of operation may change from time to time ; the members need not know each other or the part played by others ; a member need not know all the details of the plan or the operation ; he must however know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose.'

11.6 A close examination of the terms of reference would reveal that the latter part of the First term of reference and the second term of reference would be matters which appear to be covered by the charge-sheet and, to some extent, the first part of the first term of reference may also appear to be so covered but in the first part

of the first term of reference, emphasis appears to be on the historical aspect as to how and in what chronology events took place which ultimately led to the assassination. Motive part, to some extent, may be covered in the first part of the first term of reference but sufficient material in the form of affidavits and documents have been placed before the Commission which go to clearly suggest that there was growth of militancy in Tamil Nadu beginning from 1981 after the outbreak of ethnic riots in Sri Lanka when shops, estates, farms factories, hotels and residences of Sri Lankan Tamils were attacked during May to August 1981 and the Jaffna library, which was the proud possession of Sri Lankan Tamils, was burnt down to ashes on 31.6.1981. Sri Lankan Tamil militant groups and outfits had landed on the soil of Tamil Nadu and the first incident came to notice when the LTTE Supremo v. Prabhakaran opened fire on Uma Maheshwaran alias Mukundan, leader of PLOTE, in May 1982 in Pondy Bazar, Madras. In connection with this incident. V. Prabhakaran was arrested on 19.5.1982. Even the Maheshwaran was arrested on 24.5.1982 when he opened fire on a constable at Gummudipoondi, Madras. In view of this material, it would be proper to take into account the sequence of events since 1981 till the day of assassination.

CONCLUSION

First, the Commission for the present would not go into the areas covered by the charge-sheet and will probe into areas which are outside the charge-sheet and will proceed to hold an inquiry in respect of persons and agencies, other than those against whom charge-sheet has been filed in the Designated Court, who are responsible for conceiving, preparing and planning the assassination of Shri Rajiv Gandhi, former Prime Minister of India :

Second, the SIT will make the case diary, documents, records and materials concerning investigation available to the Commission keeping in view the requirements of the trial of the case before the Designated Court, simultaneously also seeing that the progress in the inquiry by this Commission is not hampered or delayed :

Third, the matters covered by the terms of reference of Justice Verma Commission would be outside the purview of this Commission ; and

Fourth, the Commission shall take into account the sequence of events beginning from 1981 till 21.5.199), the day of assassination.

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